(33)

IN THE

Supreme Court of the United States

No. 898

FRED LOCHMANN, *Petitioner,*

vs.

ED SYKES, for and on behalf of himself and certain others, similarly situated and as agent for those others, to-wit: Max Phillips, John Wesley Phillips, Lewis Griffin, LeRoy Griffin, Wesley V. Louis, and Albert Headley, *Respondents.*

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF KANSAS.

BRIEF IN OPPOSITION TO THE GRANTING OF THE PETITION.

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STATEMENT OF FACTS.

In view of the rule that the granting of the writ of certiorari rests in the discretion of this court, we think it might be of assistance to the court to make a short statement of the facts. The petitioner operates a general packing plant in Wichita, Kansas. At various times since the effective date of the Fair Labor Standards Act of Congress, petitioner has employed each of the respond-

ents herein in such packing plant. The respondents were each engaged in general work in the plant of the petitioner, consisting in a large part of work in the killing, slaughtering, skinning and dressing of cattle and hogs belonging to the petitioner. The cattle and hogs slaughtered by the petitioner were purchased by the petitioner at the stock yards in Wichita, Kansas, indiscriminately of origin from in-state and out-of-state points. The livestock market of Wichita, Kansas, receives stock from the state of Oklahoma, Colorado, and other points. Each day the petitioner would purchase on the open market, such hogs and cattle as he might require for slaughtering that day, without reference to whether the cattle had been shipped from points out of the state.

They were slaughtered by the petitioner, through his employees, some of whom were the respondents, and the edible portions of the animals were processed and sold as meat products in the State of Kansas in competition with similar products offered by other producers.

The edible portions of the animals were sold in the state of Kansas; the hides were sold to the Reed Hide Company, who shipped the hides in interstate commerce and to points out of the state. The other inedible portions were sold to desiccating companies, who processed such and made tankage or fertilizer, which tankage or fertilizer was subsequently sold out of the state and transported through the instrumentalities of interstate commerce.

In addition to the above activities, petitioner purchased from out of the state, certain articles such as cheese, oleomargine, etc., which he wholesaled to retail stores and jobbers in Kansas. In the processing of the meat, the respondents used spices and binding meal,

which he purchased outside of the state and shipped into the state.

The respondents herein, as employees of the petitioner, did whatever work that came to hand in the plant of the petitioner. A great deal of such time was devoted to the skinning, slaughtering, killing, and dressing of cattle and hogs, but also, to other activities necessary to be carried on in the plant of the petitioner. (R. 108)

PROPOSITION ONE.

We shall reply to the propositions of the petitioner's brief in the order in which petitioner sets them out. Petitioner propounds the question:

> "Are the employees of the petitioners, (respondents herein) engaged in work which constitutes the production of goods for interstate commerce, within the provisions of the Fair Labor Standards Act?"

The question propounded by proposition one has been decided by this court adverse to the argument and contention of the petitioner.

In *United States of America v. Darby,* 312 U. S. 100-126, this court had before it an indictment charging the Darby Lumber Company of acquiring raw material in the state of Georgia, which he manufactured into finished lumber with the intention, when manufactured, to ship it in intrastate commerce and some part of it, to points outside of the state of Georgia, and that he had failed to pay minimum wages overtime and to keep records.

The lower court sustained a demurrer on the grounds that manufacturing within the state was beyond Federal Power and that the act was unconstitutional as a regulation of interstate commerce.

This court held the act was valid in its entirety. In the course of the opinion, this court said:

> "And finally, we have declared 'The authority of the Federal Government over interstate commerce does not differ in extent or character from that retained by the state over intrastate commerce."

Further the court said:

> "Without attempting to define the precise limit of the phrase (production for commerce) we think the acts alleged in the indictment are within the sweep of the Statute. The obvious purpose of the act was not only to prevent the interstate transportation of the proscribed product but to stop the initial steps toward transportation, production with the purpose of so transporting it * * * production for commerce, intended, includes at least production of goods, which at the time of production, the employer, according to the normal course of his business, intends and expects to move in interstate commerce, although, through the exigencies of the business all of the goods may not, thereafter, actually enter into interstate commerce."

Further the court said:

> "The means adopted by section 15-(a) (2) for the protection of interstate commerce by the surpression of the production of the condemned goods for interstate commerce is so related to the commerce and so effects it as to be within the reach of the commerce power. See *Currin v. Wallace,* Supra. 306 U. S. 11."
>
> "Congress to attain its objective in the surpression of nation-wide competition in interstate commerce by goods produced under sub-standard labor conditions has made no distinction as to the volume or the amount of shipments in the commerce or of production for commerce by any particular shipper or pro-

ducer. It recognized, that in present day industry, competition by a small part may effect a whole and that the total effect of the competition of many small producers may be great. See H. Rept. No. 21-82, 75th Congress, 1st Session, page 7. The legislation aimed at a whole embraces all its parts."

The question propounded in proposition one, by the petitioner, is, also, answered by this court's decision in *Kirschbaum v. Walling,* (consolidated with *Arsenal Building Corporation v. Walling*), 316 U. S. 517. This case involved the question, whether the employees of the owners of certain buildings, whose work consisted of keeping said building in condition and in operating elevators in said building for the benefit of tenants engaged in the manufacturing of or buying and selling of clothing in interstate commerce.

Two Circuit Courts of Appeal had held that the activities of such employees were under the act. This court granted certiorari because of the importance of the case. In affirming the decision of the Circuit Court, this court said, "We agree, however, with the conclusion of the court below; in our judgment, the work of the employees in these cases, had such a close and immediate tie with the process of production for commerce and was, therefore, so much an essential part of it that the employees are to be regarded as engaged in operations necessary to the production of goods for commerce."

In *Fleming, administrator, v. Peoples Packing Company,* District Court, Western Division, Oklahoma, 42 Fed. Suppl. 868, the facts were the same as the case at bar, and the contentions advanced by the petitioner in the case at bar are the same as were advanced in that cause. The District Court held that the employees of the Packing Company were not under the protection of the act.

The hides and offals in that case represented some 3 or 4% of the value of the carcass. The hides were sold to a purchaser in Oklahoma City, who in turn sold them outside of the state. The offals were sold to a purchaser in Oklahoma City who processed them, converting them into grease, and tankage. Then the products were sold outside of the state.

The case was appealed to the Circuit Court of Appeals for the 10th Circuit and was decided by that court in 132 Fed. (2d) 236, Phillips, Circuit Judge, after stating the facts, clearly paralleling the facts in the case at bar, said:

> "In order to produce the tanned hides and the leather products made therefrom, it is necessary to slaughter the animal and remove the hides, and in order to produce the tankage and greases, fertilizer, lubricants, and soap made therefrom, it was necessary to slaughter the animal and separate the offals from the edible portions of the carcass. Clearly the employees in question were employed in handling the hides and offals and in an operation necessary to the production of the tanned hides, fertilizer, lubricants, and soap.
>
> "Admittedly, where the work of the employees in question has only a tenuous relation to the production and is not in any real sense necessary thereto, the employee is not engaged in the production of goods or in handling or in working thereon.
>
> "Where, however, the tanned hides, the fertilizer, the lubricants, and the soap resulting from the processing of the hides and offals could never have been produced had not the Peoples' Packing Company's employees removed the hides from the slaughtered animal and separated and recovered the offals from the carcasses. They performed the first step in the series of operations that produced the ar-

ticle that went into commerce. They worked on the carcasses and they removed and handled the hides and offals, the original product from which the processed article resulted. We conclude that the employees, in question, were engaged in the production of goods for commerce and in the handling and working on such goods.

The act makes no distinction as to the volume or amount of shipments in commerce or in production for commerce by any particular shipper or producer. Its policy is to exclude from commerce all goods produced for such commerce which do not conform to the specified labor standards. Nor is it material that 96% of the value of the carcass went into meat products, which were sold in intrastate commerce, so long as a substantial amount of hides and offals were processed into products, which reached the channels of commerce."

This court in No. 699, *Peoples Packing Company, petitioner, vs. Walling, Administrator of the Wage and Hour Division,* on March 15, 1943, —U. S.—, 87 L. Ed. 722 denied a petition for the writ of certiorari to the United States Circuit Court of Appeals for the 10th Circuit Court, the decision last above referred to and from which we have quoted; if the act of this court, in denying the petition for certiorari can be construed as approving or affirming the decision of the 10th Circuit Court of Appeals, then every question propounded by the petitioner in the case at bar has been answered; except his claim for fourteen (14) weeks exemption.

The records in this case shows that the petitioner knew at the time that he sold the hides to the Reed Hide Company; that the Reed Hide Company would ship the hides out of the state; for the petitioner stated there were no tanneries in Kansas. He, also, knew that the products made from the offals would be shipped and sold outside

of the state. (R. 237) So we find that proposition No. 1 of the petitioner's has been decided by this court.

This court again passed on the question proposed by petitioner in the case of *Warren Bradshaw Drilling Company v. O. V. Hall, et al,* 87 L. Ed. 99 (Advance sheets). Among other things this court says:

> "The evidence supported the findings that some of the oil produced, ultimately found its way into interstate commerce."

That cause involved the crew of a rotary drill. The rotary drill was used to drill a hole to near the producing sands, when it was removed and different tools and different crews completed the drilling of the well, some of which would be dry holes but some of which produced oil, and the crew of the rotary drill was held to be under the protection of the act. Upon this point, we submit that the petition for certiorari should be denied.

PROPOSITION TWO.

Petitioner states proposition number two as follows:

> "Are the employees of the petitioner subject to the provisions of the Fair Labor Standards Act during the whole of the time they are in the employment of the petitioner, when only a very small portion of the time is consumed in working on the goods which has only a remote relation to interstate commerce?"

The statement of petitioner, "That only a small portion of their time is consumed in working on goods which has only a remote relation to interstate commerce," has been completely answered by this court in *Peoples' Packing Company, v. Walling, Supra.* The contention that the employees worked only a portion of the time in the

production of goods for commerce and the remaining portion of their time, at such endeavor other than the production of goods for commerce has been decided by the Federal Court adverse to the contentions of the petitioner.

First let us call attention to the interpretation of the administrator, CCH Labor Law Service, Vol. 2, page 24,507:

> "Where an employee is subject to the provision of the act for certain hours worked during the work week and is exempt therefrom for other hours worked during the same work week, no segregation of either hours worked or the rate of pay during that particular work week may be permitted under the act. To interpret the provision of section seven (7) (A) of the act, otherwise, would render it easy to defeat the objectives of the act since the employer might employ his employees for the minimum hours in the production of goods for interstate commerce and employ them in intra-state commerce during the same work week for additional hours without limit."

The point was passed upon in *Fleming, administrator, vs. Knox, et al.,* District Court S. D. Georgia, decided December 22, 1941, 42 F. Supp. 948. Quoting the Syllabus:

> "Where employees during a work week interchangeably engage in working in a department of employer's lumber business involving only intra-state business and in other departments involving production of lumber for shipment in interstate commerce, the employer was required to pay to the employee, the wages prescribed by the Fair Labor Standards Act for the entire time worked including time spent in the department involving intra-state business alone." 42 F. Supp. 948.

These conclusions are supported by the express language of the act itself. The prohibition contained in sections 6 and 7 is a prohibition against the employment generally of employees of a designated class. Petitioner's contentions amount to the argument that the act should be construed to be merely prohibition against employment in the production of goods for commerce for more than forty (40) hours, but the act provides:

> "No employer shall, except as otherwise provided in this Act, *employ any of his employees who is engaged in commerce or in the production of goods for commerce.* * * * " Section 7. (Emphasis ours.)

and,

> "Every employer shall pay to each of his employees *who is engaged in commerce or in the production of goods for commerce wages* at the following rates * * * " Section 6. (Emphasis ours)

It is thus apparent that the interpretation of the Administrator is supported by the plain language of the act itself. In addition to this, the testimony in this cause (R. 58, 108) shows that a very substantial proportion of each day was spent by each of the parties in this case to the killing and dressing of livestock and to the production of hides and offals for sale in commerce. The petitioner can not escape the burden of the act and at the same time take the benefit of interstate commerce. If the employees were employed by him for more than forty (40) hours and for less than the wages prescribed by the act and if they were employees coming within the act designated by Congress during each week upon which recovery was sought and granted, then the petitioner must respond in damages as provided by the act.

The decisions of lower Federal Courts cited by petitioner establish only that the employees must show that during each week for which recovery is sought they were of the designated class i.e., employees who were engaged in the production of goods for commerce. This the proof amply showed and the Trial Court so found and the decision upon the proof was approved by the Supreme Court of Kansas. Respondents do not concede that certiorari is a proper remedy to raise in this court a question of proof.

Further, upon this point, we would like to call the court's attention to the fact that the petitioner did not in the trial court, tender any issue upon this point. The act itself imposes a duty upon petitioner to keep a record of the hours worked and the wages paid, and in the case at bar the petitioner kept no record of the hours worked, and the trial court made no finding as to any hours worked except the hours worked in the production of goods for commerce.

PROPOSITION THREE.

Petitioner in his proposition three propounds the question, "Is the petitioner entitled to fourteen (14) weeks exemption from the operation of the act under section 8 (C) of the act?" The question is answered adversely to petitioner in the case of *Fleming v. Swift and Company,* 41 Fed. Supplement 825; Affirmed 131 Fed. 249. Further, the petitioner did not raise the question, by his pleadings, in the trial court. Since the employer may select the week or weeks that he claims as exempt and that may apply to any number of his employees, as he may see fit, it was an affirmative defense and should have been pleaded in the trial court.

PROPOSITION FOUR.

Proposition four stated by the petitioner is, "What amounts should be allowed to respondent as attorneys' fees?" The act provides that the trial court shall allow reasonable attorneys' fees to be paid by the defendant. This matter rests in the sound discretion of the trial court. This court in its long history has never yet granted a petition for certiorari to control the discretion of a state trial court. I can imagine no grounds, in the granting of a fee by the trial court, that would be of interest or that this court would review. Perhaps the matter is not properly presented here, but we suggest that this court should fix reasonable fees for the preparation of the brief in the event that the petition for certiorari is denied.

We respectfully submit that the petition should be denied.

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